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Damages for Breach of an Agreement to Arbitrate – A Useful Weapon in a Post West Tankers World?

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The much-awaited decision of the European Court of Justice ("ECJ") in *Allianz SpA v. West Tankers Inc*, Case C-185/07 in February this year has focused renewed attention on the remedies available to a party confronted with court proceedings commenced in another jurisdiction in breach of an agreement to arbitrate. Now that the possibility of seeking an anti-suit injunction has been removed (at least when the injunction is sought in one EU Member State in relation to proceedings already underway in another Member State), what effective remedy is available to a party seeking to prevent court proceedings in another EU jurisdiction in breach of an agreement to arbitrate? The recent decision of the English Commercial Court in *CMA CGM SA v .Hyundai Mipo Dockland Ltd* [2008] EWHC 2791 (Comm) addresses one practical alternative – seeking an award of damages for breach of the agreement to arbitrate.

The English Commercial Court published its judgment in *CMA* three months before the ECJ decision in *West Tankers*. CMA had originally commenced proceedings against the Hyundai Mipo Dockyard (HMD) in tort in the Marseilles Commercial Court. CMA alleged that HMD had unreasonably refused to agree to the novation of four shipping contracts to CMA. The French court upheld CMA's claim and held HMD liable for US$3,646,125 and €10,000 in damages and €30,000 in costs. HMD countered by commencing arbitration in London against CMA pursuant to the arbitration clauses in the four shipping contracts. HMD claimed that the French proceedings were commenced in breach of the agreement to arbitrate and thus it was entitled to damages equal to the value of the French judgment obtained in breach of contract. The Tribunal upheld HMD's claim. The Tribunal held that the recognition and enforcement provisions of Arts. 32 and 33 of EU Council Regulation 44/2001 ("the Judgments Regulation") do not apply to arbitral tribunals and thus it was not bound to recognize the prior French judgment under the Judgments Regulation.

CMA appealed the award under section 69 of the English Arbitration Act 1996 *inter alia* on the basis that the Tribunal *was* bound by the prior French judgment as a consequence of the Judgments Regulation. Burton J of the English Commercial Court rejected the appeal. Burton J held that on the proper construction of Arts. 1, 32 and 33 of the Judgments Regulation the obligation to recognise a judgment in another Member State that applies to courts in a Member State under the Judgments Regulation does not extend to arbitral tribunals seated in a Member State. In particular, Burton J affirmed that the reference to a "court or tribunal of a Member State" in Art. 32 of the Judgments Regulation does not extend to an arbitral tribunal (which, even though it might be seated *in* a Member State is not a court or tribunal "of" that Member State). Thus, even where the

English courts would be obliged to recognize a prior judgment in another Member State, an arbitral tribunal seated in England is not similarly bound.

On its face, this case confirms that arbitrators seated in London have broad jurisdiction to award damages for breach of an agreement to arbitrate even where there is a conflicting judgment in another Member State. This is potentially a powerful weapon in the armoury of a party confronted with court proceedings in breach of an agreement to arbitrate. Moreover, the possibility of an award of damages and costs may deter a party from commencing tactical proceedings in a friendly national court in breach of an agreement to arbitrate.

The judgment in *CMA* is likely to be the subject of further analysis and scrutiny as parties seek new remedies in a post *West Tankers* world. Two questions are likely to merit particular attention.

First, can the English judgment in *CMA* survive the subsequent judgment of the ECJ in *West Tankers*? In principle, the answer should be yes. The two cases address fundamentally different issues. In *West Tankers*, the ECJ addressed, and gave narrow scope to, the arbitration exclusion in Art. 1(2)(d) of the Judgments Regulation in allocating jurisdiction *between* courts in Member States (in that case, England and Italy). The ECJ held that, following the general principle enshrined in the Judgments Regulation that the court first seised should determine its own jurisdiction, the English courts could not assume jurisdiction to issue an anti-suit injunction where an Italian courts was already first seised. In *CMA*, there was, in contrast, no conflict of jurisdiction *between* courts in different Member States. The issue was whether an arbitral tribunal seated in England was bound by a prior French judgment. These two issues are conceptually distinct and raise quite different questions regarding the scope of application of the Judgments Regulation.

Second, will there be practical difficulties in enforcing an award of damages such as that in *CMA* in other states including, in particular, the Member State where the conflicting judgment was reached? In principle, the answer to this question should be no. A final and binding award of contractual damages for breach of an agreement to arbitrate should be readily enforceable under the New York Convention in the same way as any other arbitral award. The public policy exception under Article V 2(b) of the New York Convention is narrow should not be triggered simply by a prior conflicting judgment in the state of enforcement (see, for example, the decision of the English Court of Appeal in *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Ras Al Khaminah Nat'l Oil Co.* [1987] 2 Lloyd's Rep. 246, 254). Whether the practice of Member States corresponds with that principle when confronted with an award of damages for a conflicting judgment in their own jurisdiction, however, remains to be tested.

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